Docket No.: 059036-0022 PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of	:	Customer Number: 20277
Sergey N. RAZUMOV	:	Confirmation Number: 3651
Application No.: 09/891,321	:	Tech Center Art Unit: 3627
Filed: June 27, 2001	:	Examiner: Gerald J. O'Connor

For: METHOD AND SYSTEM FOR SELLING CLOTHES

TRANSMITTAL OF APPEAL BRIEF

Mail Stop Appeal Brief
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Submitted herewith is Appellant's Appeal Brief in support of the Notice of Appeal filed August 31, 2006. Please charge the Appeal Brief fee of $250.00 to Deposit Account 500417.

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due under 37 C.F.R. 1.17 and 41.20, and in connection with the filing of this paper, including extension of time fees, to Deposit Account 500417 and please credit any excess fees to such deposit account.

Respectfully submitted,

McDERMOTT WILL & EMERY LLP

Alexander V. Yampolsky
Registration No. 36,324

600 13th Street, N.W.
Washington, DC 20005-3096
Phone: 202.756.8000 AVY:apr
Facsimile: 202.756.8087
Date: November 30, 2006

Please recognize our Customer No. 20277 as our correspondence address.

Docket No.: 059036-0022 PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of	:	Customer Number: 20277
Sergey N. RAZUMOV	:	Confirmation Number: 3651
Application No.: 09/891,321	:	Tech Center Art Unit: 3627
Filed: June 27, 2001	:	Examiner: Gerald J. O'Connor

For: METHOD AND SYSTEM FOR SELLING CLOTHES

APPEAL BRIEF

Mail Stop Appeal Brief
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This Appeal Brief is submitted in support of the Notice of Appeal filed August 31, 2006 wherein Appellant appeals from the Primary Examiner's rejection of claims 14-26 and 31.

Real Party In Interest

This application is not assigned. The Real Party in Interest is Sergey Razumov, the sole inventor of the present application.

Related Appeals and Interferences

No other appeals or interferences are known to the Appellant, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Status of Claims

Claims 1-31 are pending. Claims 1-13 and 27-30 are withdrawn from consideration. Claims 14-26 and 31 stand under final rejection, from which rejection this appeal is taken.

Status of Amendments

The application has not been amended after the final Office action.

Summary of Claimed Subject Matter

As described on page 1, lines 9-12 of the present application, when clothes is sold via the Internet or using mail-order catalogs, customers do not have the opportunity to try on garments before ordering and must guess which size they would be in a given manufacturer's clothing line.

Prior art patents described in the application suggest developing a computer-generated image that shows the customer how a selected garment will fit and look. However, as described on page 2, lines 16-20, computer-generated images are generated based on mathematical models of image processing and cannot accurately represent human bodies. As a result, the garments ordered by customers do not fit properly and must be returned.

Further, as described on page 2, lines 21-25, conventional systems do not consider evaluations made by human models, which try on garments, and/or experts, which are present when models try on garments. Therefore, conventional system cannot pre-select garments suitable for a particular customer based on evaluations by the models and/or experts as to whether a selected garment fits the customer.

In addition, as described on page 2, lines 26-30, in conventional systems, customers have to choose among hundreds of articles corresponding to a particular size, rather than among a

much smaller group of articles pre-selected by models and/or experts for a particular type of a customer. As a result, Internet-based clothes shopping becomes slow and cumbersome.

To address these problems, the claimed invention suggests a method of selling goods recited in independent claim 14.

As described on page 10, lines 4-11, the method involves classifying clothes items available for sale in accordance with their types, such as dresses, suits, jackets, sweaters, etc., and particular body measurements (step 202 in FIG. 2A). A body of certain measurements may belong to a specific "body" classification. Any body classification may include certain number of body types, each of which is defined as an individual's skeleton or bone frame plus an amount of flesh surrounding a specific anatomical part. For example, as described on page 11, lines 4-6, the clothes items may be classified based on a pre-selected number of body types exceeding the number of body types used in regular classifications adopted in the fashion industry.

As described on page 11, lines 7-12, human models are selected to try on the clothes items (step 204). Each category of the classification may be represented by at least one model who tries on clothes items that belong to the respective category.

As described on page 12, lines 16-23, during an ordering procedure, customers enter their body measurements into a computer system (step 208). For example, a purchase ordering terminal described in the specification may be utilized.

As described on page 12, lines 24-28, based on the body measurements, the system determines to which category in the selected classification of clothes items a particular customer belongs. The category assigned to a customer corresponds to a human model having individual characteristics corresponding to respective characteristics of the customer. Hence, the customer may be matched with the respective human model similar to that customer.

As described on page 11, lines 16-19, when goods in the respective category are tried on by the human model corresponding to this category, the human model and/or an expert evaluate the goods being tried on.

As described on page 12, lines 4-7, a result of evaluation of each clothes item made by a model and/or a fashion expert is expressed as an evaluation mark, for example in the range from 5 to 1, where 5 may be the highest mark.

As described on page 13, lines 4-9, based on the category assigned to a customer, the system selects which clothes items of the desired type and characteristics belong to the customer's category (step 210), and determines the evaluation marks of the selected items (step 212 in FIG. 2B). The customer may be enabled to choose an acceptable threshold level of the evaluation marks. For example, the customer may choose to browse the selected items having the evaluation marks higher than 3 in the range from 5 to 1.

As described on page 13, lines 10-19, based on the selected acceptable threshold, the system may pre-select a group of the clothes items having the evaluation marks higher that the acceptable threshold (step 214). Thereafter, the system enables the customer to access data of the selected group (step 216).

Grounds of Rejection To Be Reviewed By Appeal

Whether claims 14-20, 22, 24-26, and 31 are unpatentable over the Bailey Jr. et al. publication in view of Gazzuolo (US 6,546,309) under 35 U.S.C. 103(a).

Whether claims 21 and 23 are unpatentable over the Bailey Jr. et al. publication in view of Gazzuolo (US 6,546,309) and Weaver (US 6,404,426) under 35 U.S.C. 103(a).

Argument

Rejection of independent claim 14 over Bailey Jr. et al. in view of Gazzuolo

In the application of a rejection under 35 U.S.C. §103, it is incumbent upon the Examiner to factually support a conclusion of obviousness. As stated in ***Graham v. John Deere Co.*** 383 U.S. 1, 13, 148 U.S.P.Q. 459, 465 (1966), obviousness under 35 U.S.C. §103 must be determined by considering (1) the scope and content of the prior art; (2) ascertaining the differences between the prior art and the claims in issue; and (3) resolving the level of ordinary skill in the pertinent art.

In determining the differences between the prior art and the claims, the question under 35 U.S.C. 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. ***Stratoflex, Inc. v. Aeroquip Corp.***, 713 F.2d 1530, 218 USPQ 871 (Fed. Cir. 1983); ***Schenck v. Nortron Corp.,*** 713 F.2d 782, 218 USPQ 698 (Fed. Cir. 1983).

As demonstrated below, the Examiner has failed to consider whether the claimed invention as a whole would have been obvious over the combination of references.

In particular, independent claim 14 recites a method of selling goods, comprising the steps of:

-selecting human models representing categories of a pre-set classification of goods,

-trying on the goods by the human models of the respective categories, at least one model is assigned for trying on goods that belong to a category of the classification,

-obtaining body measurements of a customer to determine to which category in a pre-set classification of goods the customer belongs,

-based on the body measurements, assigning by a computer system to the customer the category that corresponds to a human model having individual characteristics corresponding to the body measurements of the customer,

-determining by the computer system quantitative evaluation marks for the goods in the category assigned to the customer, each evaluation mark being in a range from a lower mark to a higher mark, the evaluation marks being pre-set based on evaluating the goods tried on by the respective model,

-pre-selecting by the computer system based on the determined evaluation marks, a group of items among the goods in the category assigned to the customer, and

-enabling the customer to access said group of items.

The Examiner takes the position that Bailey Jr. discloses the claimed invention and holds this reference to differ from the claimed invention in that the reference does not disclose that the evaluation marks are quantitative and are pre-set based on evaluating the goods tried by models. Gazzuolo is relied upon for disclosing the quantitative evaluation marks.

Instead of considering whether the claimed invention as a whole would have been obvious over the combination of Bailey Jr. with Gazzuolo, the Examiner separately considers differences between each claimed step and the references and determines whether the differences themselves would have been obvious.

Moreover, the Examiner admits that the references do not disclose the claimed steps. However, he takes the position that the claimed steps are inherent. The Examiner's position is respectfully traversed.

Considering the references, Bailey Jr. discloses a website for selling custom-tailored clothing. The website gives access "to a wide variety of catalogues containing clothes in various

styles. Clothing is projected as a 3D model that can be rotated for multiple views on the customer's own home computer. Video and sound clips are available to display and describe the clothing on human models with varying physical characteristics. This display allows the customers to gain a better idea of how the clothing might look on them." (the paragraph bridging pages 6 and 7).

"Having selected some clothes, the customer is asked to make choices about materials, colors, style options, and body measurements. Based on this data, the resulting garment is presented for inspection on an appropriately proportioned computer generated model. If the customer finds the garment acceptable, he or she initiates the purchase..." (the first full paragraph on page 7).

The Gazzuolo patent discloses maintaining a database of mathematical body scan fit models. Based on customer's body measurements, several body scan fit models are selected for each customer. When the customer selects a body scan fit model, she virtually tries- on the garments she brought with her. The recommended size and fit analysis of the garment are then displayed (see col. 12, lines 40-65).

For each fit factor, the fit analysis generates a numerical value from very loose to very tight. These numerical values are then used to generate images of the garment fitting the visual body model (col. 9, lines 27-30).

Accordingly, both references disclose virtual fitness rooms that use computer-generated images showing to customers whether a particular garment fits.

By contrast, claim 14 recites assigning a human model for trying on goods that belong to a certain category of classification, and based on the body measurements, assigning by the computer system to the customer, the category that corresponds to a human model having

individual characteristics corresponding to the body measurements of the customer. Hence, the claimed invention requires the computer system to match the customer with the corresponding human model that tried on goods.

It is respectfully submitted that the combined teachings of the references would not teach or suggest matching by the computer system, the customer with the human model having characteristics corresponding to the customer's body measurements, as claim 14 requires.

The Examiner appears to take the position that Bailey's system discloses that customers having certain size are assigned to models having the same size. However, the Bailey's publication does not disclose this feature. Instead, Bailey discloses that video and sound clips are available to display and describe the clothing on human models with varying physical characteristics. This display allows the customers to gain a better idea of how the clothing might look on them.

Accordingly, it appears that the Examiner believes that this claimed feature is inherent in the Bailey's teaching. However, relying on inherency requires certainty, not speculation. ***In re Rijckaert***, 9 F.3rd 1531, 28 USPQ2d 1955 (Fed. Cir. 1993); ***In re King***, 801 F.2d 1324, 231 USPQ 136 (Fed. Cir. 1986); W. ***L. Gore & Associates, Inc. v. Garlock, Inc.***, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983); ***In re Oelrich***, 666 F.2d 578, 212 USPQ 323 (CCPA 1981); ***In re Wilding***, 535 F.2d 631, 190 USPQ 59 (CCPA 1976). To establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probability or possibilities. ***In re Robertson***, 169 F.3d 743, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999).

The Examiner provided no factual basis upon which to conclude that Bailey's system necessarily involves assigning customers to the human models having corresponding size. Moreover, one skilled in the art would realize that there is no need to assign customers to corresponding human models in the Bailey's system, because customers select garments based on computer-generate images. Videos of human models are available only to provide initial representation of goods.

As one skilled in the art would realize, many physical stores play videos of human models on TV screens. However, they don't use a computer system to match customers with human models having similar characteristics.

Accordingly, the Examiner's position of inherency is unwarranted.

Further, claim 14 recites pre-selecting by the computer system based on the determined quantitative evaluation marks (being pre-set based on evaluating the goods tried on by the respective model), a group of items among the goods in the category assigned to the customer. Hence, the claim requires reducing the number of goods presented to the customer to a smaller group of items based on the quantitative evaluation marks determined when the corresponding human model tried on the goods.

The Examiner takes the position that Bailey discloses selecting a group of items (the items to be purchased) among the goods in the category.

However, Bailey does not disclose selecting the items to be purchased based on the quantitative evaluation marks. Moreover, Gazzuolo (relied upon for disclosing quantitative evaluation marks) discloses that for each fit factor of the mathematical model, the fit analysis generates a numerical value from very loose to very tight. These numerical values are then used to generate images of the garment fitting the visual body model (col. 9, lines 27-30).

Accordingly, the combined teachings of Bailey with Gazzuolo would not teach or suggest reducing the number of goods presented to the customer to a smaller group of items based on the quantitative evaluation marks determined when the corresponding human model tried on the goods, as the claimed invention requires.

The Examiner's position indicates that instead of considering whether the claimed invention as a whole would have been obvious over the combination of Bailey Jr. with Gazzuolo, the Examiner separately considers differences between each claimed step and the references and determines whether the differences themselves would have been obvious.

It is well settled that "in determining whether the invention as a whole would have been obvious under 35 U.S.C. 103, we must first delineate the invention as a whole. In delineating the invention as a whole, we look not only to the subject matter which is literally recited in the claim in question... but also to those properties of the subject matter which are inherent in the subject matter and are disclosed in the specification...., it is this invention as a whole, and not some part of it, which must be obvious under 35 U.S.C. 103." ***In re Antonie,*** 559 F.2d 618, 620, 195 USPQ 6, 8 (CCPA 1977).

It is respectfully submitted that the Examiner has failed to consider the invention as a whole by looking to the properties of the invention which are inherent in the subject matter and are disclosed in the specification.

In particular, the discovery of the source of a problem is part of the 'subject matter as a whole' which should always be considered in determining the obviousness of an invention under 35 U.S.C. § 103." ***In re Sponnoble,*** 405 F.2d 578, 585, 160 USPQ 237, 243 (CCPA 1969).

As discussed above, the claimed invention addresses the problem of inability of computer-generated images generated based on mathematical models to accurately represent

human bodies. As a result, the garments ordered by customers do not fit properly (page 2, lines 16-20 of the present application). To solve this problem, the claimed invention suggests using a human model representing a certain category of goods to try on the goods in this category. When the goods are tried on by the human model, evaluation is performed to preset quantitative evaluation marks for the goods. A computer system matches a customer with the human model having characteristics corresponding to the body measurements of the customer to enable the customer to select goods based on evaluation made when the goods are tried on by this human model. As a result, the customer may select goods based on subjective factors defined by a human being rather than by a mathematical model.

None of the references of record addresses these problem and solution. Moreover, neither Bailey nor Gazzuolo recognizes the problem caused by computer-generated models. Both of these references suggest using the mathematical models for selecting goods.

It is well settled that a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. ***W.L. Gore & Associates, Inc. v. Garlock, Inc.,*** 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

As indicated above, both Bailey and Gazzuolo expressly **teach away** from the claimed invention by suggesting that computer generated images should be used for selecting goods. Thereby they constitute further **evidence of nonobviousness**. ***In re Bell***, 991 F.2d 781, 26 USPQ2d 1529 (Fed. Cir. 1993); ***In re Hedges***, 783 F.2d 1038, 228 USPQ 685 (Fed. Cir. 1986); ***In re Marshall***, 578 F.2d 301, 198 USPQ 344 (CCPA 1978).

In addition, as described on page 2, lines 26-30 of the present application, the claimed invention addresses a problem of Internet-based shopping that requires customers to choose

among hundreds of articles corresponding to a particular size. As a result, Internet-based clothes shopping becomes slow and cumbersome.

The claimed invention proposes solving this problem by pre-selecting a smaller group of goods for a particular type of a customer based on quantitative evaluation marks made when the goods are tried by human models having characteristics corresponding to body measurements of the customer.

Neither Bailey nor Gazzuolo addresses or recognizes this problem.

It is well settled that the test for obviousness is what the combined teachings of the references would have suggested to those having ordinary skill in the art. ***Cable Electric Products, Inc. v. Genmark, Inc.***, 770 F.2d 1015, 226 USPQ 881 (Fed. Cir. 1985). In determining whether a case of prima facie obviousness exists, it is necessary to ascertain whether the prior art teachings appear to be sufficient to one of ordinary skill in the art to suggest making the claimed substitution or other modification. ***In re Lalu***, 747 F.2d 703, 705, 223 USPQ 1257, 1258 (Fed. Cir. 1984).

As demonstrated above, the combined teachings of Bailey and Gazzuolo is not sufficient to arrive at the claimed subject matter that requires the computer system to match a customer with the human models having characteristics corresponding to customer's body measurements, and to pre-select a smaller number of items among goods available in a certain category based on evaluation marks pre-set when the goods are tried on by the respective human model.

Therefore, the Examiner's conclusion of obviousness is unwarranted. Hence, the Examiner's rejection of claim 14 under 35 U.S.C. 103 is improper.

Rejection of dependent claims 15-20, 22, 24-26 and 31 over Bailey Jr. et al. in view of Gazzuolo

The dependent claims are defined over the combination of Bailey with Gazzuolo at least for the reasons presented above in connection with independent claims 14.

In addition, the applied reference combination would not teach or suggest the following features of these claims:

-the evaluation performed by the human models wearing the goods, as claim 16 requires;

-the goods include clothes items, and the evaluation is performed by an expert based on a judgment as to whether the goods are suitable for the models wearing those goods, as claims 17 and 18 require;

-the customer is enabled to select the goods based on the evaluation of an expert having a predetermined fashion preference, as claim 19 recites;

-the pre-set classification takes into account body types of customers, as claim 20 recites;

-the pre-set classification further takes into account color of customer's eyes, as claim 22 requires;

-the customer is enabled to access data on additional items associated with each of the pre-selected items, as claim 24 recites;

-the additional items are pre-selected when the goods are tried on by the human model, as claim 25 recites;

-the additional items are pre-selected by fashion experts, as claim 26 requires;

-selecting a threshold of evaluation marks acceptable for the customer, wherein the pre-selected group of items has the evaluation marks higher than the threshold, as claim 31 requires.

The Examiner takes the position that features recited in claims 16-20, 22, 24-26 are either inherent to Bailey or common in the art. However, he provides no evidence to support his conclusions.

With respect to claim 31, the Examiner admits that Bailey does not disclose the step of selecting a threshold of evaluation marks acceptable for the customer, wherein the pre-selected group of items has the evaluation marks higher than the threshold. However, he relied upon Gazzuolo (col. 12, lines 14-20) for disclosing this feature.

Considering the paragraph of Gazzuolo in col. 12, lines 14-20, the reference discloses that a virtual sales person can suggest additional garment choices, and the virtual fitting room may include animated sequences of the visual fit model wearing and moving in the garment.

Accordingly, this portion of Gazzuolo does not disclose the step of selecting a threshold of evaluation marks acceptable for the customer, wherein the pre-selected group of items has the evaluation marks higher than the threshold, as claim 31 requires.

Moreover, as discussed above Gazzuolo discloses that for each fit factor, the fit analysis generates a numerical value considered by the Examiner to correspond to the claimed evaluation mark. These numerical values are then used to generate images of the garment fitting the visual body model (col. 9, lines 27-30).

The reference does not teach or suggest pre-selecting a group of items based on the numerical values. Accordingly, the reference cannot teach or suggest selecting a threshold of evaluation marks acceptable for the customer, wherein the pre-selected group of items has the evaluation marks higher than the threshold, as claim 31 requires.

Hence, the Examiner's rejection of claims 15-20, 22, 23-26 and 31 is improper.

Rejection of claims 21 and 23 over the Bailey Jr. et al. publication in view of Gazzuolo (US 6,546,309) and Weaver (US 6,404,426)

Claims 21 and 23 recite that the pre-set classification respectively takes into account color of customer's hair, and tone of customer's skin. The Examiner relies upon Weaver for disclosing these features.

Weaver suggests creating a computer-rendered model to reproduce a human body. This model may have a particular hair color and skin tone.

However, the reference does not teach or suggest selecting human models representing categories of a pre-set classification that takes into account color of customer's hair, and tone of customer's skin, as claims 21 and 23 dependent from claim 14 require.

The rejection of claims 21 and 23 further confirms that the Examiner has failed to consider whether the claimed invention as a whole would have been obvious.

Similarly to previously discussed Bailey and Gazzuolo references, Weaver **clearly teaches away** from the claimed invention by suggesting to use computer-rendered images instead of human models. Therefore, this reference constitutes further **evidence of nonobviousness** of the claimed invention.

It is respectfully submitted that the rejection of claims 21 and 23 under 35 U.S. C. 103 is improper.

Conclusion

For all of the foregoing reasons, Appellant respectfully submits that the grounds of rejection of the claims on appeal is in error and should be reversed.

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper,

including extension of time fees, to Deposit Account 500417 and please credit any excess fees to such deposit account.

Respectfully submitted,

McDERMOTT WILL & EMERY LLP

Alexander V. Yampolsky
Registration No. 36,324

600 13th Street, N.W.
Washington, DC 20005-3096
Phone: 202.756.8000 AVY:apr
Facsimile: 202.756.8087
Date: November 30, 2006

Please recognize our Customer No. 20277 as our correspondence address.

CLAIMS APPENDIX

14. A method of selling goods, comprising the steps of:

selecting human models representing categories of a pre-set classification of goods,

trying on the goods by the human models of the respective categories, at least one model is assigned for trying on goods that belong to a category of the classification,

obtaining body measurements of a customer to determine to which category in a pre-set classification of goods the customer belongs,

based on the body measurements, assigning by a computer system to the customer the category that corresponds to a human model having individual characteristics corresponding to the body measurements of the customer,

determining by the computer system quantitative evaluation marks for the goods in the category assigned to the customer, each evaluation mark being in a range from a lower mark to a higher mark, the evaluation marks being pre-set based on evaluating the goods tried on by the respective model,

pre-selecting by the computer system based on the determined evaluation marks, a group of items among the goods in the category assigned to the customer, and

enabling the customer to access said group of items.

15. The method of claim 14, wherein the customer is enabled to watch video images depicting in motion the human models wearing the pre-selected items.

16. The method of claim 14, wherein the evaluation is performed by the human models wearing the goods.

17. The method of claim 14, wherein the goods include clothes items.

18. The method of claim 14, wherein the evaluation is performed by an expert based on a judgment as to whether the goods are suitable for the models wearing those goods.

19. The method of claim 14, wherein the customer is enabled to select the goods based on the evaluation of an expert having a predetermined fashion preference.

20. The method of claim 14, wherein the pre-set classification takes into account body types of customers.

21. The method of claim 20, wherein the pre-set classification further takes into account color of customer's hair.

22. The method of claim 20, wherein the pre-set classification further takes into account color of customer's eyes.

23. The method of claim 14, wherein the pre-set classification takes into account tone of customer's skin.

24. The method of claim 14, wherein the customer is enabled to access data on additional items associated with each of the pre-selected items.

25. The method of claim 24, wherein the additional items are pre-selected when the goods are tried on by the human model.

26. The method of claim 25, wherein the additional items are pre-selected by fashion experts.

31. The method of claim 14, further comprising the step of selecting a threshold of evaluation marks acceptable for the customer, wherein the pre-selected group of items has the evaluation marks higher than the threshold.

EVIDENCE APPENDIX

Non-Applicable

RELATED PROCEEDINGS APPENDIX

Non-Applicable